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No. 541

In the Supreme Court of the United States

OCTOBER TERM, 1957

MICHIGAN CONSOLIDATED GAS COMPANY, A CORPORATION,
PETITIONER

v.

FEDERAL POWER COMMISSION, PANHANDLE EASTERN PIPE LINE COMPANY, AND UNION GAS COMPANY OF CANADA, LIMITED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinions and orders of the Federal Power Commission (R. 1289–1337; 1384–1388) are reported at 15 F. P. C. 46 and 16 F. P. C. 870. The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 6a–21a) is reported at 246 F. 2d 904.

JURISDICTION

The judgment of the Court of Appeals was entered on July 16, 1957 (Pet. App. 22a). The petition for a writ of certiorari was filed on October 1[illegible], 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether, on the basis of the record and the proceedings in the instant case, the Federal Power Commission erred in finding that the export by Panhandle Eastern Pipe Line Company of increased volumes of off-peak gas to an existing utility customer in Canada was not inconsistent with the public interest.

STATUTES INVOLVED

The Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U. S. C. 717, *et seq.*, provides, in pertinent part, as follows:

> Section 3. After six months from the date on which this act takes effect, no person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest. The Commission may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate, and may, from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate.

STATEMENT

Pursuant to an application made by Panhandle Eastern Pipe Line Company, the Federal Power Com-

mission issued an order authorizing Panhandle to increase its exports of natural gas by 15,500,000 Mcf annually for sale to Union Gas Company of Canada on an off-peak, interruptible basis for storage and supply of domestic, commercial, and industrial processing uses in various communities in Southwestern Ontario. The Commission found that such exportation of gas would be consistent with the public interest under Section 3 of the Natural Gas Act, *supra*. On a petition for review sought by Michigan Consolidated, the Court of Appeals affirmed (Pet. App. 6a–21a). The pertinent facts may be summarized as follows:

The off-peak gas proposed to be sold to Union is part of the gas which will be made available by an increase in the capacity of Panhandle's transmission system, for which that company sought certificate authorization. This gas will remain available after allocation among Panhandle's domestic customers of all of the increased capacity for supplying firm requirements based upon peak demands. Michigan Consolidated did not seek any of the gas on a firm requirement basis but only additional annual volumes of off-peak, interruptible gas for resale for industrial uses (Pet. App. 13a, R. 1319).

Panhandle's contract with Union Gas Company, dated April 21, 1954, is for a term of 20 years from the date of first delivery of gas thereunder. In addition to the 5,500,000 Mcf of natural gas the export of which has been authorized by the Commission since 1946, it provides for the delivery to Union of 10,500,000 Mcf of natural gas in the first year, with

annual increases of 1,000,000 Mcf each year thereafter until a maximum of 15,500,000 Mcf is reached. The price agreed upon was 35 cents per Mcf, or 120% of the general service rates fixed by the Commission for Panhandle in Michigan, whichever is higher. The export and sale was to be on an interruptible basis, *i. e.*, on peak days when the demands of domestic consumers equalled or exceeded the volume of natural gas available, none would be exported. Approximately two-thirds of the respective annual volumes would be delivered during the seven summer months, April through October. The remainder would be delivered during the five winter months. Panhandle is obligated to deliver not less than 92% of the scheduled two-thirds volume of gas during the summer months and not less than 88% of the scheduled one-third volume during the winter months. On an annual basis, Panhandle is obligated to deliver 90% of the scheduled volume. No boiler fuel sales of gas are to be made. The contract is to be terminated in the event equivalent volumes of gas become available to Union from a pipeline which may be constructed in Canada. The principal object of the contract is to make natural gas available in the Hamilton, Ontario market (R. 1314–1315).

Consideration of Panhandle's export application was consolidated with the proceedings which resulted from the filing of a series of applications by Panhandle and its affiliate, Trunkline Gas Company, for certificates of public convenience and necessity under Section 7 (c) of the Act authorizing the proposed expansion of the natural gas facilities of the Panhandle system and the

allocations of the resulting increased volumes of gas among its customers (R. 1211).

The record shows that Panhandle owns and operates an integrated natural gas pipeline system which extends from its sources of supply in the Hugoton and Panhandle field in Texas, Oklahoma, and Kansas, through the states of Missouri, Illinois, Indiana, Ohio and Michigan (R. 1212). By means of its expansion program, Panhandle proposed to increase the peak-day ability of its system to deliver by 455,000 Mcf per day, increasing its peak-day capacity from an estimated 970,000 Mcf per day to an estimated 1,425,000 Mcf per day (R. 1293). This expansion was to be accomplished by the installation of additional loop and lateral pipelines and compressors and by the development of a natural gas storage field near Waverly, Illinois (R. 1213). In connection with this expansion program and based on its anticipated capacity increase, Panhandle entered into agreements with its customers, not including Michigan Consolidated, for increased deliveries of natural gas (Pet. App. 14a). Thereafter, Panhandle amended its application by eliminating the proposed additional compressor facilities and the proposed development of the Waverly Field for storage, substituting instead additional expansion of its main line and compressor capacity plus additional facilities for its subsidiary, Trunkline (R. 1214). As a result of these modifications, the additional peak-day capacity sought by Panhandle from its expansion program was reduced from 455,000 Mcf to about 260,000 Mcf per day, but the annual capacity

of the system was in fact increased more than originally contemplated (Pet. App. 9a).

The Commission found that Panhandle's service to its customers in the United States will not be impaired by export of interruptible gas to Union in Canada (R. 1317, 1386–1387). It also ruled that it would not deny the export authorization on the ground that Panhandle should first develop Howell Field in Michigan, as a gas storage project, since, *inter alia*, material evidence was "lacking respecting geological matters, operational cost items and other factors which it is necessary to consider in deciding whether or not the Howell Field can or should be developed for storage" (R. 1318). While finding that the export proposal was not inconsistent with the public interest, the Commission found further that the public interest required the imposition of a condition on the export authorization that the authorization may be "modified from time to time or terminated, after opportunity for hearing, upon further order of the Commission" (R. 1321, 1336).

ARGUMENT

1. Petitioner's first contention (Pet. 8–12) is that the Commission exceeded its authority under Section 3 of the Natural Gas Act by authorizing export of interruptible gas to Union at a time when this gas is allegedly needed in the United States. This issue is not presented in this case because, as the court below points out (Pet. App. 14a), the record does not support the essential factual premise that export of this interruptible gas will impair Panhandle's ability to render adequate service to its domestic customers. For its factual assumption, petitioner places principal

reliance on the statement of the hearing examiner that Panhandle's customers have firm peak-day requirements of 187,200 Mcf per day in excess of Panhandle's capacity. But this peak-day figure has no present relevance. It is drawn from the fact that Panhandle's original project for expansion of capacity, including the development for storage at the Waverly Field, was based on estimates of its firm-demand customers for the use of the additional 455,000 Mcf of natural gas on peak days. When Panhandle modified its expansion program (*supra,* pp. 5–6), the result was that, while the over-all volume of natural gas available to its customers was greatly increased, its peak-day volume, although also increased, did not reach the figure which its original plan contemplated. It is because the modified plans fail to provide as much excess peak-day gas as contemplated by the original plans, that petitioner claims that Panhandle's service to its domestic customers will necessarily be impaired by the export of gas to Union. The fallacy in the argument is that it ignores the cardinal fact that the gas to be exported to Union will be sold on a non-peak day, interruptible, basis—*i. e.*, the exported gas will be of no use to peak-day customers. Thus, there is no foundation for the general claim of Michigan Consolidated that this gas is "urgently needed by consumers in the United States" (Pet. 12). Indeed, the Commission noted that none of Panhandle's other customers expressed any fears that the export proposal would in any way impair service to them (R. 1386); and the Commission affirmatively found that the authorized export of gas would not impair Panhandle's service to its domestic

customers (R. 1386–1387). It is settled that such a determination of the Commission will not be reversed unless there is a clear insufficiency of evidence or a clear abuse of discretion. *Colorado Interstate Gas Co.* v. *Federal Power Commission,* 324 U. S. 581; *Manufacturers Light & Heat Co.* v. *Federal Power Commission,* 206 F. 2d 404 (C. A. 3). Neither insufficiency of evidence or abuse of discretion exists in this case.

2. There is no conflict with the decision in *City of Pittsburgh* v. *Federal Power Commission,* 237 F. 2d 741 (C. A. D. C.), as claimed by petitioner (Pet. 13–19). In that case, the Commission had before it an application by Texas Eastern Transmission Corporation for a certificate of convenience and necessity to abandon natural gas service through its Little Inch pipeline from Baytown, Texas, to West Virginia and, as a substitute, to construct a tie-line connecting the Baytown area to one of Texas Eastern's other pipelines. During the hearings, Texas Eastern urged that this tie-line, although necessary for any expansion, would not be economically feasible without abandonment of the Little Inch. The refusal of the presiding examiner to permit cross-examination on whether a certain volume of expansion might not make the tie-line feasible even without abandonment was sustained by the Commission on the ground that it had no jurisdiction to consider any alternatives to the specific proposal made by the applicant, Texas Eastern. The Commission also upheld the refusal of the examiner to permit the introduction of evidence that the abandonment of the Little Inch would make subsequent expansions more expensive at the cost of the consumers. In reversing,

the Court of Appeals held that, while the weight to be given to such evidence was for the Commission, it was relevant and should have been received and considered by it in light of the fact that the Commission had the duty of determining that the granting of the application was in the public interest.

City of Pittsburgh is clearly different from the present case. In the first place, here, unlike *City of Pittsburgh*, the Commission received and considered all the evidence offered. Moreover, in *City of Pittsburgh,* it was necessary for the Commission to make a positive finding that the proposal was required by the public convenience and necessity before the certificate could issue. Here, the export application was to be granted unless the Commission found that the exportation "will not be consistent with the public interest." The proponents—the petitioner here and (in *City of Pittsburgh*) the natural gas company—each had the burden of proof. In *Pittsburgh,* the gas company failed to sustain the burden; in the instant case, petitioner admittedly has not met its burden since one of its main complaints is that the Commission should have procured certain evidence on its own motion (Pet. 16).

Petitioner also relies (Pet. 15) on footnote 28 of the *Pittsburgh* decision (237 F. 2d at 751) to support its contention that both the Commission and the Court of Appeals erred in holding that the Commission did not have power to compel Panhandle to store its excess gas in the Howell Field in Michigan. While doubt had been expressed by the Commission that this could be done directly, and while the Court of Appeals held,

in the companion case subsequently decided (the *Central West Utility Co.* v. *Federal Power Commission*, 247 F. 2d 306 (C. A. 3), August 6, 1957) that it could not, both concerned themselves with the question whether the development of Howell Field for storage was feasible. So doing, the Commission found, and the court below agreed, that the evidence presented in favor of this alternative was insufficient to permit any determination as to whether the Howell Field should be developed for storage. There is clearly no conflict in this respect with the *City of Pittsburgh* case.

It is likewise apparent that the refusal of the court below to consider Panhandle's application to abandon its service to Michigan Consolidated, which was filed after the Commission's order denying rehearing in this case, is not in conflict with the *City of Pittsburgh* opinion (See Pet. 17–19). The court in that case specifically stated that it "need not decide the admissibility of the new application [for expansion] in the face of the argument that it occurred long after the hearing was closed." 237 F. 2d at 752. It did rule that Texas Eastern's expansion plans should have been considered in the proceeding relating to the abandonment of the Little Inch as a natural gas pipeline, but this was because the record then before the Commission amply showed that an expansion was being planned. In this case, even if the court below might have considered Panhandle's abandonment application although not part of the record, at most the proceeding on that application might indicate that Panhandle's

consumers have unsatisfied peak-day demands on a firm basis. As already noted, this has no relevance here since the gas to be exported to Union is non-peak, interruptible gas which would be of no use in satisfying unfilled peak-day requirements.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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